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In the Supreme Court of the United States

JOSEPH JESNER, ET AL., PETITIONERS

v.

ARAB BANK, PLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether a corporation may be named as a defendant in a federal common-law action brought under the Alien Tort Statute, 28 U.S.C. 1350.

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INTEREST OF THE UNITED STATES

This case concerns the scope of claims that may be brought in a federal common-law action under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The United States has a substantial interest in the proper application of the ATS because actions under the ATS can have implications for the Nation's foreign and commercial relations and for the enforcement of standards of conduct under international law.

STATEMENT

1. Petitioners are aliens who were (or represent) victims of terrorist activities in Israel, Gaza, and the West Bank. Pet. App. 1a, 4a. They filed actions in the United States District Court for the Eastern District of New York seeking damages from respondent, a multinational bank headquartered in Jordan. *Ibid.* Their complaints invoked the Alien Tort Statute, 28 U.S.C. 1350,

which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." See Pet. App. 5a.

This Court has interpreted the ATS to permit "litigation of a narrow set of common law actions derived from the law of nations." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 721 (2004). Such common-law claims are available "only for alleged violations of international law norms that are specific, universal, and obligatory." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (citations and internal quotation marks omitted); see *Sosa*, 542 U.S. at 732. Any such claim must also "touch and concern" the United States with "sufficient force to displace the presumption against extraterritorial application" of U.S. law. *Kiobel*, 133 S. Ct. at 1669.

Petitioners here contend that respondent violated well-established international-law standards of conduct by "financing and facilitating the activities of organizations that committed the attacks that caused [their] injuries." Pet. App. 4a. According to petitioners, the terrorist organizations "arranged those attacks in part by promising, and later delivering, financial payments to the relatives of 'martyrs' who were killed—along with those who were injured or captured—while perpetrating the attacks." *Id.* at 9a. Petitioners allege that respondent maintained bank accounts that it knew to be collecting donations that would fund the terrorist attacks. *Id.* at 10a-11a. Petitioners also allege that respondent "played an active role in identifying the families of 'martyrs,'" "created individual bank accounts for th[ose] beneficiaries," and "facilitated transfers of * * * funds into those accounts, often routing the transfers

through its New York branch in order to convert Saudi currency into Israeli currency." *Id.* at 11a.

2. After several years of pretrial proceedings, the district court dismissed petitioners' suits on the ground that the Second Circuit's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2010), aff'd on other grounds, 133 S. Ct. 1659 (2013), foreclosed "claims against corporations under the ATS." Pet. App. 6a (citation omitted). In *Kiobel*, the Second Circuit had viewed "international law," rather than "domestic law," to control whether a corporation may be a defendant in a federal common-law action under the ATS. 621 F.3d at 125; see *id.* at 125-131. It had held that no matter what a corporation or its agent might do, a claim would not be available under the ATS because "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance" in the international community. *Id.* at 145; see *id.* at 131-145.

No other circuit that has addressed the corporate-defendant issue has imposed such a bar, see Pet. App. 24a-25a, and this Court granted certiorari in *Kiobel* to review the Second Circuit's creation of one, see 133 S. Ct. at 1663. But the Court ultimately affirmed the Second Circuit's judgment on the alternative ground that the *Kiobel* plaintiffs' claims did not touch and concern the United States with sufficient force to support a claim under the ATS. *Ibid.* The district court here, in dismissing this case, believed that "[n]othing in [this] Court's affirmance [in *Kiobel*] undercuts the authority of the Second Circuit's decision" in that case. Pet. App. 7a (citation omitted).

3. The court of appeals affirmed. Pet. App. 1a-33a. The panel explained that it would apply the corporate-

defendant bar even though this Court's decision in *Kiobel* had "cast a shadow on" that bar "in several ways." *Id.* at 22a. The panel recognized, for example, that this Court's description of actions under the ATS as arising "'under federal common law,'" or "'under U.S. law,'" "appears to reinforce" a construction of the ATS as "leaving domestic law to govern the available remedy and, presumably, the nature of the party against whom it may be obtained." *Id.* at 22a, 23a (quoting *Kiobel*, 133 S. Ct. at 1663, 1666) (emphasis omitted). But because circuit precedent on the subject had not been "overruled," the panel elected to adhere to it. *Id.* at 26a.

The panel rested its judgment entirely on the corporate-defendant bar and expressly declined to address whether petitioners' claims were subject to dismissal on extraterritoriality grounds. Pet. App. 27a-29a. Both parties had briefed the extraterritoriality issue, see Resp. C.A. Br. 29-54; Pet. C.A. Reply Br. 4-19; both parties had represented to the court that the record was sufficient to decide it, C.A. Tr. 3; Resp. C.A. Br. 29; and both parties had urged the court to decide it, C.A. Tr. 2; Resp. C.A. Br. 29. The panel nevertheless reasoned that the issue "was not the focus of either the district court's decision or the briefing on appeal" and deemed it "unwise to decide the difficult and sensitive issue of whether the clearing of foreign dollar-denominated payments through a branch in New York could, under these circumstances, displace the presumption against the extraterritorial application of the ATS." Pet. App. 28a.

4. Following a poll initiated by the panel, the full court denied rehearing en banc. Pet. App. 34a-63a.

The court was divided over the correctness of its corporate-defendant bar. Compare Pet. App. 43a-48a

(Cabranes, J., concurring in the denial of rehearing en banc), with *id.* at 49a-58a (Pooler, J., dissenting from the denial of rehearing en banc). Judge Jacobs, joined by three other judges, reasoned that, even without the corporate-defendant bar, this case would "straightforwardly" be subject to dismissal on extraterritoriality grounds. *Id.* at 38a; see *id.* at 36a-43a. He observed that the "only contact with the United States mentioned in the [panel] opinion is that terrorist groups used branches of [respondent] in a score of countries (including a single U.S. branch, in Manhattan) for, among other ordinary transactions, the conversion of funds from one currency to another." *Id.* at 39a. And he described the U.S.-based transactions as the "kind of transaction that can be done at an automated airport kiosk." *Id.* at 40a n.1. Judge Chin, joined by one other judge, defended the panel's decision not to address extraterritoriality. *Id.* at 59a-63a (Chin, J., dissenting from the denial of rehearing en banc).

SUMMARY OF ARGUMENT

This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation. The particular claims in this case, however, present significant extraterritoriality questions that warrant direct consideration by the court of appeals on remand.

I. The court of appeals erred in holding that a corporation can never be subject to a "civil action" for a "tort * * * in violation of the law of nations," 28 U.S.C. 1350. A "civil action" under the ATS is a claim defined by federal common law, and the common law has long recognized corporations as proper defendants in tort suits. A "tort * * * in violation of the law of nations" is

a wrong done in contravention of specific and universal international-law standards, which can apply to the actions of either a corporation or an individual whom the common law would recognize to be acting on the corporation's behalf. The ATS was enacted to ensure a private damages remedy for incidents with the potential for serious diplomatic consequences, and Congress had no good reason to limit the set of possible defendants in such actions to potentially judgment-proof individuals.

The court of appeals misconstrued this Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), to require a specific and universal international-law standard of corporate liability as a prerequisite for a claim against a corporation under the ATS. *Sosa* requires a claim under the ATS to be based on a well-established international-law standard of *conduct*, not a well-established international-law standard of *liability*. When a well-established standard of conduct is violated, which can potentially occur as the result of either individual or corporate behavior, international law gives each nation substantial discretion on questions of enforcement within its own jurisdiction. While international law is one of the factors a district court should consider in determining whether to recognize a common-law cause of action under the ATS, nothing in international law discountenances civil claims against corporations.

II. Although respondent's corporate status does not justify dismissal of petitioners' claims, dismissal may be warranted, in whole or in part, on other grounds. In particular, respondent has raised a serious question concerning whether petitioners' claims have a sufficient connection to the United States to satisfy the extraterritoriality concerns recognized in this Court's decision in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659

(2013). Petitioners' claims involve foreign parties and seek damages arising out of the actions of foreign terrorist organizations on foreign soil. The only domestic connection identified by the court of appeals is the alleged routing of dollar-denominated foreign transactions through respondent's New York branch. Although automated clearance of dollar-denominated transactions would be sufficient to support enforcement of some federal statutes, it would not generally be sufficient in isolation to support recognition of a federal common-law claim under the ATS. The function of the ATS is to ensure private damages remedies in circumstances where other nations might hold the United States accountable if it did not provide a remedy. The dollar's prevalence as the currency of choice for unlawful actors does not in itself present such a circumstance.

The extraterritoriality issue was briefed and presented for decision in the court of appeals, and the court of appeals should address it directly upon remand. The unwarranted continuation of this case would be detrimental to the foreign-policy interests of the United States. A trial in this case would be subject to a preexisting sanctions order that Jordan has declared to be an affront to its sovereignty and that would seriously hinder respondent's ability to defend itself against the immense damages claims at issue. Delaying consideration of potentially dispositive threshold issues and allowing suit to proceed against a key Jordanian financial institution would harm the United States' relationships with Jordan and other important allies in the fight against terrorism. It would also have consequences for the United States' ability to rely on the cooperation of respondent, which has cooperated with the United States to help prevent terrorist financing.

ARGUMENT

Enacted by the First Congress in 1789, the Alien Tort Statute, 28 U.S.C. 1350, grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." See Act of Sept. 24, 1789 (1789 Judiciary Act), ch. 20, § 9, 1 Stat. 77 (providing that federal district courts "shall * * * have cognizance * * * of all causes where an alien sues for a tort only in violation of the law of nations"). In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court construed the ATS to permit district courts, in appropriate circumstances, to "recognize private claims under federal common law" for the violation of sufficiently universal and specific international-law standards of conduct. *Id.* at 732. Claims under federal common law traditionally include claims against corporations, and respondent's corporate status is therefore not a basis for dismissing petitioners' claims here. Those claims, however, may be subject to dismissal on remand, in whole or in part, on the alternative ground that they fail to satisfy the extraterritoriality standard identified by this Court in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

I. A CORPORATION CAN BE A DEFENDANT IN A FEDERAL COMMON-LAW ACTION UNDER THE ALIEN TORT STATUTE FOR THE VIOLATION OF A WELL-ESTABLISHED INTERNATIONAL-LAW NORM

The ATS permits a federal district court, in appropriate circumstances, to hear a "civil action" for a "tort * * * in violation of the law of nations." 28 U.S.C. 1350. A corporation is capable of being named as a defendant in a common-law "civil action," and such an action may involve a "tort," including a "tort * * * in violation of

the law of nations" committed by the corporation or its agent. A corporation can therefore be a proper defendant in a civil action based on an otherwise-valid claim under the ATS.

A. A Federal Common-Law "Civil Action" May Name A Corporation As A Defendant

A "civil action" under the ATS, 28 U.S.C. 1350, arises under federal common law. Since the time of the ATS's enactment, the common law has authorized actions against corporations.

1. A claim under the ATS is a "cause of action under U.S. law to enforce a norm of international law." *Kiobel*, 133 S. Ct. at 1666. The task of "defining a cause of action" includes, *inter alia*, "specifying who may be liable," *id.* at 1665—*i.e.*, the set of permissible defendants. See, *e.g.*, *United States* v. *Bormes*, 568 U.S. 6, 15 (2012) (describing definition of the defendant class as part of the statute's "remedial scheme").

For some types of actions based on international-law violations, Congress has directly spoken to that question. The Torture Victim Protection Act of 1991 allows damages suits for certain acts of torture and extrajudicial killing only against an "individual"—*i.e.*, a natural person. Pub. L. No. 102-256, 106 Stat. 73; see *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 451-452 (2012); see also *Kiobel*, 133 S. Ct. at 1665.

The text of the ATS, in contrast, "does not distinguish among classes of defendants." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). Rather, in enacting the ATS, the First Congress understood that "the common law would provide a cause of action" in appropriate cases. *Sosa*, 542 U.S. at 724, 732; see *Kiobel*, 133 S. Ct. at 1663.

2. It has long been "unquestionable" under domestic law that corporations are "deemed persons" for "civil purposes" and can be held civilly liable. *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston* v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 134 (1838). Both at the time of the ATS's enactment and now, corporations have been capable of "suing and being sued." 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793); see 1 William Blackstone, *Commentaries on the Laws of England* 463 (1765) (Blackstone) (corporations may "sue or be sued * * * and do all other acts as natural persons may"); 2 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 475 (1803) (Tucker) (same); see also *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (detailing "common understanding" that corporations have long had the "capacity to sue and be sued").

As particularly relevant here, corporations have long been capable of being sued in tort. "At a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Philadelphia, Wilmington, & Balt. R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210 (1859); see *Chestnut Hill & Spring House Tpk. Co.* v. *Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts."). In 1774, for example, Lord Mansfield's opinion for the Court of King's Bench held that a corporation could be

held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor of Lynn* v. *Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, *e.g.*, *Chestnut Hill*, 4 Serg. & Rawle at 17; *Riddle* v. *Proprietors of Locks & Canals on Merrimack River*, 7 Mass. (6 Tyng) 168 (1810); *Gray* v. *Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Townsend* v. *Susquehannah Tpk. Road*, 6 Johns. 90 (N.Y. Sup. Ct. 1810).

3. A rule excluding corporations as defendants in actions under the ATS would not only be inconsistent with the common law, but would also be in considerable tension with the understanding that corporations can be party to such actions as plaintiffs. In 1795, Attorney General William Bradford addressed a situation in which "U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone." *Kiobel*, 133 S. Ct. at 1667. "In response to a protest from the British Ambassador," Bradford expressed the view that "'there can be no doubt that *the company* or individuals who have been injured * * * have a remedy by a civil suit'" under the ATS. *Id.* at 1668 (quoting 1 Op. Att'y Gen. 57, 59 (1795)) (emphasis added); see *Sosa*, 542 U.S. at 721.

If the set of potential plaintiffs under the ATS—which is textually limited to "alien[s]," 1789 Judiciary Act § 9, 1 Stat. 77—was understood to include corporations, then the set of potential defendants—which is not textually limited at all, see *Argentine Republic*, 488 U.S. at 438—would naturally have been as well. Indeed, a later Attorney General, opining on a boundary dispute over the diversion of waters from the Rio Grande, stated that citizens of Mexico would have a claim under

the ATS against the "Irrigation Company." 26 Op. Att'y Gen. 250, 251 (1907).

B. A "Civil Action" Against A Corporation Under The Alien Tort Statute May Be Premised On A "Tort In Violation Of The Law Of Nations"

A "tort * * * in violation of the law of nations," 28 U.S.C. 1350, can provide a valid basis for an action against a corporate defendant under the ATS. Such a tort is a type of injury or wrong. The phrase does not impose a limitation on who may be held responsible for the wrongdoing. And a common-law claim against a corporation may involve such a tort.

1. Both in 1789 and now, the term "tort" has been defined as an "injury or wrong." See, *e.g.*, 2 T. Cunningham, *A New and Complete Law-Dictionary* (1765); see, *e.g.*, 1 Owen Ruffhead & J. Morgan, *A New Law-Dictionary* (9th ed. 1772); *Black's Law Dictionary* 1717 (10th ed. 2014). And the modifying phrase "in violation of the law of nations," 28 U.S.C. 1350, refers solely to the type of conduct at issue in the tort.

Under *Sosa*, a tort is "in violation of the law of nations," 28 U.S.C. 1350, for purposes of the ATS when a certain kind of international-law "norm"—*i.e.*, a particular kind of "standard for right or wrong behavior," *Black's Law Dictionary* 1223—is transgressed. See *Sosa*, 542 U.S. at 725, 728-732, 738; see also *Kiobel*, 133 S. Ct. at 1664-1666, 1668. *Sosa* explained that, in enacting the ATS, Congress "understood that the district courts would recognize * * * torts corresponding to * * * three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724; see *id.* at 715, 720. *Sosa* further explained that a modern court might construe

the relevant "law of nations," 28 U.S.C. 1350, also to include a standard of conduct defined by "present-day" international law. *Sosa*, 542 U.S. at 725. Any such standard, however, must be a "norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." *Ibid.*

2. Both corporations and their agents are capable of committing a "tort * * * in violation of the law of nations," 28 U.S.C. 1350. A tort by either type of actor could thus support a federal common-law cause of action against a corporation under the ATS.

No principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations. "In the past it was sometimes assumed that individuals and corporations, companies or other juridical persons created by the laws of a state, were not persons under (or subjects of) international law. In principle, however, individuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures." 1 Restatement (Third) of Foreign Relations Law pt. II intro. note (1986) (footnote omitted). A U.S. Military Tribunal at Nuremberg, for example, observed that certain action by "private individuals, including juristic persons," would be "in violation of international law." 10 United Nations War Crimes Commission, *Law Reports of Trials of War Criminals: The I.G. Farben and Krupp Trials* 44 (1949).

Other international-law norms likewise neither require nor necessarily contemplate a distinction between natural and juridical actors. See, *e.g.*, Convention Against

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 1, 19 (1988), 1465 U.N.T.S. 85, 113, 114 (defining "torture" to include "*any* act by which severe pain or suffering * * * is intentionally inflicted on a person" for certain reasons, "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") (emphasis added); Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, 280 (defining genocide to include "any of the following acts" committed with intent to destroy a group, without regard to the type of perpetrator); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3) (prohibiting "the following acts," without regard to the type of perpetrator).

A distinction between natural and juridical actors for purposes of common-law actions under the ATS would also be at odds with the longstanding treatment of common-law actions based on piracy, "a violation of the law of nations familiar to the Congress that enacted the ATS," *Kiobel*, 133 S. Ct. at 1667. It was historically "not an uncommon course in the admiralty, acting under the law of nations," including in piracy cases, "to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof." *Harmony* v. *United States* (*The Malek Adhel*), 43 U.S. (2 How.) 210, 233 (1844). "[T]his [wa]s done from the

necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." *Ibid.* The principle that a juridical person (a ship) may be held liable for piracy in violation of the law of nations, and the logic underlying that principle, cannot readily be squared with a categorical bar against juridical corporate defendants under the ATS.

That is particularly so because vicarious liability for corporations is itself a well-pedigreed feature of the common law. As Blackstone explained, "the master is answerable for the act of his servant, if done by his command, either expressly given, or implied." Blackstone 417; see Tucker 429-430 (same). That "maxim of '*respondeat superior*'" has long applied to corporate and noncorporate defendants alike. *Philadelphia & Reading R.R.* v. *Derby*, 55 U.S. (14 How.) 468, 487 (1853); see *id.* at 485-487 (applying principle to railroad company). Accordingly, even if a particular norm were not understood to apply directly to the actions of a corporation as such, a corporation could still be named as a defendant in a common-law action based on a violation of that norm by a natural person acting as the corporation's agent or employee.

3. The history of the ATS reinforces that it permits courts, in appropriate cases, to recognize common-law claims against corporations for law-of-nations violations.

The First Congress enacted the ATS following the well-documented inability of the Continental Congress to provide redress for law-of-nations and treaty violations for which the United States might be held accountable. See *Sosa*, 542 U.S. at 715-717. That deficiency

was exposed by events like the "so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Leg[ation] in Philadelphia." *Id.* at 716-717; see William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-492 & n.136 (1986) (Casto); see also *Kiobel*, 133 S. Ct. 1666. "The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided." *Kiobel*, 133 S. Ct. 1666. A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494; see *Kiobel*, 133 S. Ct. at 1666-1667. Again, the "national government was powerless to act." Casto 494.

The United States was "embarrassed by its potential inability to provide judicial relief to foreign officials injured" within its borders. *Kiobel*, 133 S. Ct. at 1668. "Such offenses against ambassadors violated the law of nations, 'and if not adequately redressed could rise to an issue of war.'" *Ibid.* (quoting *Sosa*, 542 U.S. at 715). The First Congress addressed that concern both by criminalizing certain law-of-nations violations (piracy, violation of safe conducts, and infringements on the rights of ambassadors), see Act of Apr. 30, 1790 (1790 Act), ch. 9, §§ 8, 28, 1 Stat. 113-114, 118, and by providing jurisdiction under the ATS over actions by aliens seeking civil remedies. Not only a public remedy, but also "a private remedy," was "thought necessary for diplomatic offenses under the law of nations," *Sosa*,

542 U.S. at 724, and "[t]he ATS ensured that the United States could provide a forum for adjudicating such incidents," *Kiobel*, 133 S. Ct. at 1668.

In undertaking to provide that forum, Congress did not have a good reason to distinguish between foreign entanglements for which natural persons were responsible and foreign entanglements for which organizations of natural persons, such as corporations, were responsible. Nor did Congress have a good reason to allow a suit to proceed only against a potentially judgment-proof individual actor while barring recovery against the corporation on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process-service company for the purpose of serving a summons, the international affront could perhaps best be vindicated (and compensation paid) through a private suit against that company. Cf. 1790 Act §§ 25-26, 1 Stat. 117-118 (providing that "any writ or process" that is "sued forth or prosecuted by any person" against an ambassador or "domestic servant" of an ambassador shall be punished criminally and would constitute a violation of "the laws of nations").

C. A Common-Law Action Against A Corporation Under The Alien Tort Statute For Violation Of A Well-Established Norm Is Consistent With International Law

The ATS permits a common-law "civil action" against a corporate defendant for a qualifying "tort * * * in violation of the law of nations," 28 U.S.C. 1350, irrespective of whether international law would itself provide a remedy against a corporation in such circumstances. An individual nation's recognition of such a claim accords with international law, which establishes

substantive standards of conduct but generally leaves each nation with substantial discretion as to the means of enforcement within its own jurisdiction. See *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) ("[I]nternational law defines norms and determines their scope, but delegates to domestic law the task of determining the civil consequences of any given violation of these norms."), cert. denied, 136 S. Ct. 798 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 152 (2d Cir. 2010) (Leval, J., concurring only in the judgment) ("[I]nternational law says little or nothing about how those norms should be enforced. It leaves the manner of enforcement * * * almost entirely to individual nations."), aff'd on other grounds, 133 S. Ct. 1659 (2013); Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself * * * does not require any particular reaction to violations of law.")

1. In creating its corporate-defendant bar, the court of appeals construed the ATS to "leave[] the question of the nature and scope of liability—who is liable for what—to customary international law." *Kiobel*, 621 F.3d at 122. It thus surveyed whether "corporate liability for a 'violation of the law of nations' is a norm 'accepted by the civilized world and defined with a specificity.'" *Id.* at 130 (citations omitted). That inquiry was misconceived.

The phrase "of the law of nations" in the ATS modifies "violation," not "civil action." 28 U.S.C. 1350. The "norm" analysis under *Sosa* thus focuses on whether the international community specifically and universally condemns the underlying *conduct*, not whether the international community specifically and universally imposes civil *liability*. See, *e.g.*, *Sosa*,

542 U.S. at 738 (concluding that particular "*illegal detention* * * * violate[d] no norm of customary international law") (emphasis added); see also, *e.g.*, *Kiobel*, 133 S. Ct. at 1665 (describing claims under the ATS as premised on "alleged violations of international law norms"); *Sosa*, 542 U.S. at 732 (favorably citing description of ATS as limited to "heinous *actions*" that "violate[] definable, universal, and obligatory norms") (citation omitted; emphasis added). "The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law." *Kiobel*, 133 S. Ct. at 1666. It is "instead whether the court has authority to recognize a cause of action *under U.S. law* to enforce a norm of international law." *Ibid.* (emphasis added); see, *e.g.*, *id.* at 1663 (citing *Sosa*, 542 U.S. at 714, 724).

The court of appeals' confusion stemmed in large part from its misreading of footnote 20 in the *Sosa* opinion. See, *e.g.*, *Kiobel*, 621 F.3d at 127; see also Pet. App. 52a-54a (Pooler, J., dissenting from the denial of rehearing en banc). In that footnote, this Court explained that a "consideration" that is "related" to "the determination whether a norm is sufficiently definite to support a cause of action" is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. That footnote references international law's state-action doctrine, under which "the distinction between conduct that does and conduct that does not violate the law of nations can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a State." *Kiobel*, 621 F.3d at 177 (Leval, J., concurring only in the judgment). Under the

Torture Convention, for example, conduct qualifies as "torture," and thus violates the international-law norm against "torture," only when done "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Torture Convention art. 1, S. Treaty Doc. No. 20, at 19; 1465 U.N.T.S. 114; compare, *e.g.*, Genocide Convention art. II, 102 Stat. 3045, 78 U.N.T.S. 280 (no requirement of state involvement); Common Article 3, 6 U.S.T. 3318, 75 U.N.T.S. 136 (same). Such a distinction between state and private action in international law can be analogized to the similar distinction in domestic constitutional law, under which a private party is subject to constitutional norms only when it can "fairly be said to be a state actor," *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The state-action footnote in *Sosa* does not support transposition of the *Sosa* requirements of specificity and universality from the question of conduct to the question of corporate liability. Although the footnote uses the phrase "scope of liability" to describe the state-action inquiry, it subsequently clarifies through examples that the inquiry turns on the existence of a "sufficient consensus" that particular *conduct*—*e.g.*, "torture" or "genocide"—"violates international law" when undertaken "by private actors." *Sosa*, 542 U.S. at 732 n.20; see *ibid.* (discussing *Kadic* v. *Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), and *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985)). Reliance on the footnote to support a distinction between natural and corporate defendants is particularly misplaced in light of its reference to "a private actor *such as a corporation*

or individual," which expressly affiliates corporations and natural persons for ATS purposes. *Ibid.* (emphasis added).

Respondent defends the court of appeals' approach on the alternative ground that "[u]nder normal choice-of-law rules, the types of defendants who may be held liable for violating a legal rule is a question of substance, not procedure." Br. in Opp. 29 (emphasis omitted). But the distinction drawn by the ATS is not between substance and procedure; it is between the "civil action" (which is defined by federal common law) and the underlying "violation of the law of nations" (which is defined by international law). 28 U.S.C. 1350; see *Kiobel*, 133 S. Ct. at 1665-1666. As this Court has explained, "identifying" an "international law norm[] that [is] specific, universal, and obligatory * * * is only the beginning of defining a cause of action," which encompasses additional decisions such as "specifying who may be liable." *Kiobel*, 133 S. Ct. at 1665 (citations and internal quotation marks omitted). The application of domestic law to those decisions may result in a cause of action either narrower or broader in certain respects than it might be if international law controlled. See *ibid.* It also gives federal courts the tools—and the obligation—to apply uniquely domestic considerations in determining whether a claim against any kind of defendant is warranted in the circumstances of a particular case.

2. Although international law does not control nations' domestic means of enforcing international-law norms within its jurisdiction, it may nevertheless be relevant to enforcement questions. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) (explaining that although "the public law of nations can hardly dictate to a country which is in theory wronged how to

treat that wrong within its domestic borders," it is, "of course, true that United States courts apply international law as a part of our own in appropriate circumstances"). There are, for example, internationally accepted rules on jurisdiction and immunities. See, *e.g.*, 1 Restatement (Third) of Foreign Relations Law §§ 421, 423 (1986) (international law on jurisdiction to adjudicate); *id.* §§ 451-456 (international law on foreign sovereign immunity); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium), Judgment, I.C.J. 3, 20-21 (Feb. 14) (head-of-state immunity).

International law may also inform a U.S. court's exercise of its domestic common-law authority under the ATS. The limitation of the strict *Sosa* test to the question of the standard of conduct, rather than the question of liability for that conduct, does not prevent federal courts from taking international law into account in the development of federal common law on issues to which international law relates. If, for example, international law were clearly to discountenance the imposition of liability on corporations for violating the law of nations, or a particular norm under the law of nations, federal courts might be well-served by declining to recognize a federal common-law claim against corporations under the ATS, even though common-law claims against corporations have a long historical pedigree. But no such situation is presented here.

The fact that no international tribunal has been created for the purpose of holding corporations civilly liable for violations of international law does not counsel against federal common-law actions against corporations under the ATS. Each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to

whether such limitations are required by or reflective of customary international law. See, *e.g.*, Rome Statute of the International Criminal Court (Rome Treaty), art. 10, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 98 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").* That is why, even though no international tribunal has been created for the purpose of holding natural persons civilly liable, it is nevertheless well-accepted that natural persons can be defendants in civil actions under the ATS. See, *e.g.*, *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019 (7th Cir. 2011) ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals.").

Limitations on the jurisdiction of international *criminal* tribunals to natural persons (see *Kiobel*, 621 F.3d at 132-137) appear to be based on reasons unique to criminal punishment—*e.g.*, the view under some legal regimes that "criminal intent cannot exist in an artificial entity" or that "criminal punishment does not achieve its principal objectives when it is imposed on an abstract entity." *Kiobel*, 621 F.3d at 167 (Leval, J., concurring only in the judgment) (emphasis omitted). In any event, international tribunals are not intended to be the sole (or even the primary) means of

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* The United States has not ratified the Rome Treaty; is accordingly not bound by it; and would not necessarily regard all of its provisions as reflecting customary international law, especially insofar as it has expressed "concerns about significant flaws in the treaty," Statement on the Rome Treaty on the International Criminal Court, 3 Pub. Papers 2816 (Dec. 31, 2000) (President William J. Clinton).

enforcing international-law norms. At least until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And, notably, several countries (including the United Kingdom and the Netherlands) that have incorporated the three crimes punishable by the International Criminal Court (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See, *e.g.*, Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), http://www.biicl.org/files/4364_536.pdf.

Furthermore, a number of current international agreements (including some that the United States has ratified) affirmatively require signatory nations to impose liability on corporations for certain actions. See, *e.g.*, United Nations Convention Against Transnational Organized Crime, art. 10(1), *adopted* Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. 1, 7 (2004), 2225 U.N.T.S. 209, 279; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, *adopted* Nov. 21, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. 1, 4 (1998), 37 I.L.M. 1, 3. As a noted scholar has explained, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets." M. Cherif Bassiouni, *Crimes*

Against Humanity in International Criminal Law 379 (2d rev. ed. 1999).

II. THE COURT OF APPEALS SHOULD ADDRESS EXTRATERRITORIALITY AND OTHER THRESHOLD ISSUES DIRECTLY ON REMAND

Although the court of appeals' erroneous application of a corporate-defendant bar requires vacatur of the judgment below, it does not require that petitioners' claims be allowed to proceed in district court. Respondent has raised a number of alternative arguments for dismissing those claims, at least one of which—extraterritoriality—has been fully briefed and presented by both parties for the court of appeals' decision. See, *e.g.*, Br. in Opp. 20-26; p. 4, *supra*. Because petitioners' claims raise serious extraterritoriality questions, and because prompt appellate resolution of those questions would further foreign-policy and judicial-efficiency interests, the court of appeals should address those questions directly upon remand.

A. The Automated Clearance Of Dollar-Denominated Transactions In The United States Would Not Alone Provide A Sufficient Domestic Nexus Under *Kiobel*

1. The "presumption against extraterritoriality" requires courts to construe federal statutes to "have only domestic application," unless Congress has "clearly expressed" a contrary intent. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2097, 2100 (2016). Applying that presumption helps to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

In *Kiobel*, this Court held that the "principles underlying the presumption against extraterritoriality * * * constrain courts exercising their power under the ATS." 133 S. Ct. at 1665. The Court emphasized that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do" in recognizing causes of action under federal common law. *Id.* at 1664. The Court explained that concerns about judicial intrusion into the realm of foreign policy "are implicated in any case arising under the ATS," and that courts asked to recognize claims under the ATS should be "'particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.'" *Id.* at 1664, 1665 (quoting *Sosa*, 542 U.S. at 727).

The Court stated that "even where" claims asserted under the ATS "touch and concern the territory of the United States," they will be actionable only if they "do so with sufficient force to displace the presumption against extraterritorial application" of U.S. law. *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 266-273 (2010)). The requisite claim-specific inquiry necessarily takes place against the backdrop of the ATS's function of providing redress in situations where the international community might consider the United States accountable. See *RJR Nabisco*, 136 S. Ct. at 2101; *Kiobel*, 133 S. Ct. at 1668-1669; *Sosa*, 542 U.S. at 714-718, 722-724 & n.15; pp. 15-17, *supra*.

2. The claims in this case all involve foreign plaintiffs seeking recovery from a foreign defendant based on injuries incurred at the hands of foreign terrorist organizations acting on foreign soil. See Pet. App. 1a, 4a,

9a. The court of appeals viewed the argument for application of U.S. law to those claims as centering on respondent's alleged "clearing of foreign dollar-denominated payments" related to the terrorist activities "through [its] branch in New York." *Id.* at 28a; see *id.* at 11a (recounting allegations that respondent "often rout[ed] * * * transfers through its New York branch in order to convert Saudi currency into Israeli currency"); see also Pet. 6-7 (focusing on that point); Cert. Reply Br. 6-7 (same); Pet. C.A. Reply Br. 4-19 (same); Pet. Br. 8 (same, and mentioning that respondent's New York branch holds accounts for its other branches). Petitioners contend (Pet. 6, 7 n.1) that dollars are "the preferred currency" for terrorist-related payments and that banking standards incentivize the routing of "international U.S. dollar fund transfers" through a bank's U.S. branch or affiliate. See Pet. Br. 5, 8.

In some non-ATS contexts, automated clearance activity in the United States would alone be sufficient to support the application of U.S. law that is not explicitly extraterritorial. For example, the government could potentially rely on such activity as the basis for a criminal indictment or a civil enforcement action. Cf., *e.g.*, *United States* v. *Prevezon Holdings, Ltd.*, No. 13-cv-6326, 2017 WL 1951142, at *1 (S.D.N.Y. May 10, 2017) (civil forfeiture action for laundering proceeds of foreign fraud); *United States* v. *Zarrab*, No. 15-cr-287, 2016 WL 6820737, at *5 (S.D.N.Y. Oct. 17, 2016) (federal prosecution for evading U.S. sanctions against Iran). A domestic statute that focuses, in whole or in part, on foreign misuse of domestic instrumentalities may properly be invoked to defend the integrity of the U.S. financial system. See *RJR Nabisco*, 136 S. Ct. at 2101; cf., *e.g.*, *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 796-

797 & n.24 (1993) (recognizing antitrust claims arising from foreign conduct that produces a substantial intended effect in the United States). And given "the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 171 (2004) (parenthetically quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 194 (1999)), Congress may be presumed not to require as substantial a domestic nexus in a statute enforced by the government as it might require in one enforced through private civil actions. See *RJR Nabisco*, 136 S. Ct. at 2110.

In the context of the ATS, however, the automated domestic clearance of dollar-denominated transactions in isolation does not in itself constitute a sufficient domestic nexus for recognizing a common-law claim. The "need for judicial caution" about "foreign policy concerns" when "considering which claims c[an] be brought under the ATS" may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 133 S. Ct. at 1664; see *id.* at 1664-1665; see also *Sosa*, 542 U.S. at 727-728. Courts must therefore consider whether, in light of the particularized role of the ATS, a proposed common-law claim exhibits a domestic connection of "sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-273); see *RJR Nabisco*, 136 S. Ct. at 2101. A foreign actor's preference for dollar-denominated transactions, and the consequent likelihood that a transaction will be

automatically routed through a bank's U.S. branch or affiliate, are not generally circumstances for which the international community might validly deem the United States to be responsible.

Congress did not intend the ATS to "make the United States a uniquely hospitable forum for the enforcement of international norms." *Kiobel*, 133 S. Ct. at 1668. That limitation is difficult to reconcile with an approach under which a claim under the ATS may be premised on the popularity of the dollar as a currency for remunerating foreign illegal activity. Such an expansive remedial scheme for law-of-nations violations would undermine the ATS's goal of "avoiding diplomatic strife," and instead "could * * * generate[] it." *Id.* at 1669.

3. Although automated clearance activities alone would not support claims under the ATS, petitioners have made other allegations that might affect the extraterritoriality inquiry in this case. They have alleged, for example, that respondent "knowingly laundered" money, using its New York Branch, for an organization in Texas that raised funds within the United States for Hamas. C.A. App. 207-208. It is not clear that such allegations, even in combination with clearance activities, would support any, let alone all, of petitioners' claims seeking recovery for injuries suffered in particular foreign terrorist activity. But particularly because a portion of the record and briefs in this case are under seal, the government is not currently in a position to assess whether, or to what extent, such allegations might provide a sufficient domestic connection for some of petitioners' claims. The court of appeals, however, would be able on remand to review the relevant filings and address that question.

B. Diplomatic And Efficiency Concerns Warrant Direct Consideration Of Threshold Issues By The Court Of Appeals On Remand

Claims by petitioners and others, which have been in litigation for well over a decade, have already caused significant diplomatic tensions. Should respondent, the major financial institution in Jordan, have to stand trial before the remaining threshold issues are decided by the court of appeals, the adverse foreign-policy consequences would be considerable.

1. The underlying actions are subject to an order, entered when they were consolidated with other actions for pretrial purposes, that was imposed as a sanction for respondent's insistence on adhering to foreign bank-secrecy laws by withholding certain documents from discovery. See *Linde* v. *Arab Bank, PLC*, 269 F.R.D. 186 (E.D.N.Y. 2010), appeal dismissed, 706 F.3d 92 (2d Cir. 2013), cert. denied, 134 S. Ct. 2869 (2014). Under that order, the jury would be instructed that it would be free to infer that respondent provided financial services to terrorist organizations and that it did so "knowingly and purposefully." *Id.* at 205. The order also precludes respondent from "making any argument or offering any evidence regarding its state of mind or any other issue that would find proof or refutation in withheld documents." *Ibid.*

The sanctions order has previously been the subject of an unsuccessful petition for a writ of certiorari, which followed the court of appeals' denial of respondent's request for mandamus relief from the order in a related case involving statutory claims by U.S. citizens under the Antiterrorism Act of 1990, 18 U.S.C. 2331 *et seq.*, that are similar in substance to petitioners' claims here. See *Arab Bank PLC* v. *Linde*, 134 S. Ct. 2869 (2014). At

the Court's invitation, the United States filed a certiorari-stage amicus brief in that matter. The United States recommended that, notwithstanding the "several significant" errors committed by the lower courts with respect to the order, the Court should decline to review it in that posture at that time. U.S. Amicus Br. (U.S. *Linde* Br.) at 8, *Linde*, *supra* (No. 12-1485). The United States explained, however, that Jordan viewed the order "as a 'direct affront' to its sovereignty." *Id.* at 19 (quoting Hashemite Kingdom of Jordan Amicus Br. at 14, *Linde*, *supra*) (No. 12-1485)). And it further explained that the order "could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." *Ibid.*

2. Since that filing, the United States' cooperation with Jordan has strengthened. According to the Department of State, Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria (ISIS). The Department of State has informed this Office that, in furtherance of that campaign, Jordan regularly conducts air missions over Iraq and Syria, cooperates with measures to thwart the financing of terrorist activities, and plays a critical role in international efforts to stem the flow of foreign terrorist fighters. Jordan is also an important partner in advancing a range of broad U.S. interests in the region, including efforts to forge a lasting peace between Israelis and Palestinians. The President has recently reiterated Jordan's longstanding status as "a valued partner, an advocate for the values of civilization, and a source of stability and hope." Remarks by President Trump and His Majesty King Abdullah II of Jordan in Joint Press Conference (Apr. 5, 2017),

https://www.whitehouse.gov/the-press-office/2017/04/05/remarks-president-trump-and-his-majesty-king-abdullah-ii-jordan-joint.

The sanctions order has already affected litigation of the U.S. citizens' related statutory claims, see Br. in Opp. 25-26 & n.5, and its effect here could be even greater. There are "roughly 6000" alien petitioners in this case, Pet. ii, whose combined damages claims threaten to have an overwhelming impact on respondent's financial condition. Because respondent is "Jordan's leading financial institution," "plays a significant role in the Jordanian and surrounding regional economies," and is "a constructive partner with the United States in working to prevent terrorist financing," U.S. *Linde* Br. 1, 20 (citation and internal quotation marks omitted), unwarranted continuation of petitioners' claims would undercut U.S. foreign policy interests in both direct and indirect ways. Cf. *Sosa*, 542 U.S. at 733 n.21 (noting "a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy" in ATS contexts).

Such effects could be avoided by ensuring appellate consideration of potentially dispositive issues, including the viability of petitioners' claims under *Kiobel*, at the earliest possible opportunity. Remanding the claims for a potential trial, at which respondent's chances of prevailing would be impeded by the sanctions order, would prolong the uncertainty and attendant diplomatic tensions, and could therefore produce significant and undesirable consequences even if the court of appeals were ultimately to reverse on extraterritoriality grounds. Given that both parties viewed the extraterritoriality issue to have been properly before the court of

appeals for decision, sound considerations of diplomatic comity and judicial economy favor its resolution by that court at the first possible opportunity following a remand.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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[†] The Acting Solicitor General is recused in this case.